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# Expert Testimony in Juvenile and Adult Alleged False-Confession Cases

I. Bruce Frumkin

Judges of course know that in the 1966 case of *Miranda v. Arizona*,<sup>1</sup> the United States Supreme Court ruled that a confession cannot be admitted into evidence unless a waiver of the *Miranda* rights (the rights to remain silent, to avoid self-incrimination, to obtain legal counsel before and during police questioning, and to obtain free legal counsel if indigent) is made “knowingly, intelligently, and voluntarily,” and that the 1967 ruling in the case *In re Gault*<sup>2</sup> extended these protections to juveniles. It is well known, too, that there is a substantial body of case law and commentary addressing factors courts need to consider in evaluating whether a juvenile or adult’s waiver of *Miranda* rights was valid.<sup>3</sup>

What is less well known by judges is to how assess the confession. Experts are often relied on to help understand the psychological factors relevant to a *Miranda* waiver. In particular, experts provide guidance into the voluntariness and the validity of a confession.

Expert testimony is generally of two types. The first involves an explanation of the psychologically coercive nature of either interrogations in general or the interrogation of the specific individual. Such testimony explains how interrogations can lead to false or unreliable statements. Oftentimes the testimony involves a discussion of relevant research on the “science” of false confessions. In this type of expert testimony, the defendant is not typically evaluated because that expert is not a forensic clinician, someone who can assess the particular defendant’s confession rather than only talk about confessions in general.

A second type of testimony is more defendant focused, addressing the specific interrogation and how it can produce a false confession. The expert—ordinarily a clinical psychologist or other type of mental health professional—not only reviews the interrogation itself but also conducts a psycholog-

ical evaluation on the defendant to assess whether there are particular psychological characteristics that place him or her at greater risk than others of providing unreliable or false information in light of the interrogation tactics used. As is the case when determining the validity of other aspects of a *Miranda* waiver, whether a confession is deemed true or false is assessed by the trier of fact and decided on the “totality of circumstances” standard.

The increasing use of mental health testimony in alleged false-confession cases is likely due in part to more scientific research in the area, more extensive attorney training, anecdotal data from highly publicized cases (e.g., Central Park Jogger case), as well as data collected from the Innocence Project.<sup>4</sup> The Innocence Project estimates that individuals had falsely confessed or provided incriminating information in approximately 25% of cases.<sup>5</sup> Another study from Gross and Shaffer<sup>6</sup> examined a larger sample of exonerations in a joint project from the University of Michigan Law School and the Center of Wrongful Convictions at Northwestern University School of Law. Out of 873 exonerees, 15% had confessed to their alleged crime (25% if only looking at homicide crimes).

Confessions and self-incriminating statements produced during police interrogations carry great weight with the trier of fact and become crucial components in the State proving beyond a reasonable doubt that the defendant committed the offense. Leo<sup>7</sup> reports that 80% of suspects waive their rights, while Wrightsman and Kassir<sup>8</sup> detail how confessions are produced in 50% of criminal cases and are challenged in court in 20% of cases. Although this research is now nearly 20 years old, it is this author’s personal experience that in cases in which a defendant goes to trial, the confessions are challenged at an even greater rate today.

## Footnotes

1. *Miranda v. Arizona*, 384 U.S. 436 (1966).
2. *In re Gault*, 387 U.S. 1 (1967).
3. For some recent commentary and reviews, see, e.g., Benjamin E. Friedman, *Protecting Truth: An Argument for Juvenile Rights and a Return to In re Gault*, 58 UCLA L. REV. DISC. 165 (2011); I. Bruce Frumkin & Martin Sellbom, *Miranda Rights Comprehension Instruments: A Critical Review*, 20 ASSESSMENT 545 (2013); Andrew Guthrie Ferguson, *The Dialogue Approach to Miranda Warnings and Waiver*, 49 AM. CRIM. L. REV. 1437 (2012); Saul M. Kassir et al., *Police-Induced Confessions, Risk Factors and Recommendations: Looking Ahead*, 34 LAW & HUM. BEHAV. 49 (2010); Note, *Juvenile Miranda Waiver and Parental Rights*, 26 HARV. L. REV. 2359 (2013). In addition, a useful resource of information and works relevant to juveniles is available at 2013 JUVENILE DEFENDER RESOURCE

GUIDE, ch. 8 (Interrogations & *Miranda*) (David A. Shapiro, ed.), [http://www.njdc.info/2013\\_resource\\_guide\\_ch8.php](http://www.njdc.info/2013_resource_guide_ch8.php).

4. INNOCENCE PROJECT, <http://www.innocenceproject.org/> (last visited Jan. 7, 2014).
5. *Id.* at [http://www.innocenceproject.org/Content/DNA\\_Exonerations\\_Nationwide.php](http://www.innocenceproject.org/Content/DNA_Exonerations_Nationwide.php).
6. Samuel R. Gross & Michael Shaffer, Nat’l Registry of Exonerations, *Exonerations in the United States, 1989–2012* (2012), available at [http://www.law.umich.edu/special/exoneration/Documents/exonerations\\_us\\_1989\\_2012\\_full\\_report.pdf](http://www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_full_report.pdf)
7. Richard Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266 (1996).
8. LAWRENCE S. WRIGHTSMAN & SAUL M. KASSIR, *CONFESSIONS IN THE COURTROOM* (1993).

In 2004, Drizen and Leo<sup>9</sup> analyzed 125 cases of proven false confessions in the United States between 1971 and 2002. A total of 63% of false confessors were under the age of 25, and 32% of this sample were juveniles. Tepfer, Nirider, and Tricarico<sup>10</sup> analyzed 103 exonerees throughout the country who were implicated in crimes before their 20th birthdays. All but four of the cases involved murder and/or a sex offense. Analysis showed 31% of these youth falsely confessed. This data also strongly suggested that younger children are more likely to falsely confess than older children in that 69% of 11–14-year-olds falsely confessed, compared to 38% of 15-year-olds, 19% of 16-year-olds, and 43% of 17-year-olds. Youths aged 18 and 19 falsely confessed at a rate of 15%. It is not known why there was a spike in the 17-year-old group. These data are consistent with the Gross and Shaffer study that showed of those exonerated juveniles 11–14 years of age, 74% falsely confessed, and of those 15–17 years of age, 34% falsely confessed.<sup>11</sup>

Although there have been many documented false confessions in recent years, it is impossible to determine the rate of false confessions. This is because the police usually keep no tally of the number of suspects interrogated annually, and, of those departments that do, no data are kept concerning percentages that result in a true confession, no confession, or a false confession. A suspect, despite law enforcement claims to the contrary, may even deny having confessed in the first place. In addition, a true confession may also later be retracted by the defendant. As this author has written previously, a confession is often not true or false in a dichotomous fashion.<sup>12</sup> There are varying degrees of truth regarding a particular confession. Even an essentially true confession can be challenged in court if an aspect of that confession erroneously places the defendant in a more incriminating light than what actually transpired.

It would seem that the percentage of juveniles who falsely confess, particularly in cases that are tried in juvenile court, is an underestimation of those percentages described in the exoneration studies. Youths who are tried in juvenile court likely confess at substantially higher rates than adults because these false confessions will remain undiscovered. Particularly if the charges are not serious and/or the penalties not severe, cases are less likely to be appealed. Furthermore, it is unlikely that a juvenile wrongly convicted in juvenile court will ever have his conviction reversed based on DNA testing, which is unlikely to have been performed. This is consistent with the relatively low 3% false-confession rate among both juvenile and adult exonerees who were charged with nonviolent crimes as reported in the Gross and Shaffer study.<sup>13</sup>

Defense attorneys have used mental health professionals to suppress incriminating statements at the pretrial level when the voluntariness of a confession is questioned. In *Crane v. Kentucky*,<sup>14</sup> the Supreme Court held that a confession's reliability may also be challenged at trial, even if the confession had been initially deemed voluntary. Mental health experts have routinely been used in these cases as well.

The use of expert testimony in alleged false- or coerced-confession cases, both by defense attorneys and usually by prosecutors as rebuttal, are fraught with a number of pitfalls or difficulties in the evaluative techniques used and the testimony proffered. One difficulty is the expert being unaware of interrogative techniques that are usually used and the reasons why an individual may falsely confess.

**“[I]t is impossible to determine the rate of false confessions.”**

## INTERROGATION PROCEDURES

In a disputed confession case, an assessment needs to consider the specific methodology of the interrogation in question as well as the types of interrogation procedures used by law enforcement in general. The Reid Technique<sup>15</sup> is the most widely used method in the United States to extract confessions from those individuals law enforcement believes are guilty of the offense. This technique is a nine-step process to obtain a confession. Simply described, it is one in which police confront the suspect with the knowledge that they know he or she was the person who committed the crime. Police then present two hypotheses to the suspect as to why the crime was committed. One of the hypotheses helps the suspect justify or excuse the crime, perhaps by affixing moral blame on an accomplice or the victim, or by emphasizing the suspect's impaired mental state. The other hypothesis is that the suspect is some type of evil person or monster who intended to cause the harm. The suspect's denials of guilt are handled, objections are overcome, and the police prevent the suspect from emotionally withdrawing from the situation at hand. The police give the suspect a chance to choose what he or she thinks would be the more acceptable or morally blameless explanation for the crime. Eventually a confession is obtained.

Drizen and Leo<sup>16</sup> describe the *pathways* to a false confession. It begins with what they term as the *Misclassification Error*, in which law enforcement uses behavioral analysis to make what they believe to be a determination whether a sus-

9. Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 894 (2004).

10. Joshua A. Tepfer, Laura H. Nirider, & Lynda M. Tricarico, *Arresting Development: Convictions of Innocent Youth*, 62 RUTGERS L. REV. 891 (2010).

11. Gross & Shafer, *supra* note 6, at 60, Table 17.

12. I. Bruce Frumkin, *Psychological Evaluation in Miranda Waiver and Confession Cases*, in CLINICAL NEUROPSYCHOLOGY IN THE CRIMINAL FORENSIC SETTING 135 (Robert L. Denney & James P. Sullivan eds., 2008).

13. Gross & Shaffer, *supra* note 6.

14. *Crane v. Kentucky*, 476 U.S. 683 (1986).

15. FRED E. INBAU, JOHN E. REID, JOSEPH P. BUCKLEY, & BRIAN C. JAYNE, *CRIMINAL INTERROGATION AND CONFESSIONS* (5th ed. 2013). See also the collection of Dr. Reid's materials and other publications, John E. Reid & Associates, Inc., available at <http://www.reid.com>.

16. Steven A. Drizin & Richard A. Leo, *The Three Errors: Pathways to False Confession and Wrongful Conviction*, in POLICE INTERROGATIONS AND FALSE CONFESSIONS: CURRENT RESEARCH, PRACTICE, AND POLICY RECOMMENDATIONS 9 (G. Daniel Lassiter & Christian Meissner eds., 2010).

**"A number of different models have been developed to explain why people falsely confess."**

pect is guilty or innocent. Often described as part of the pre-interview, a properly trained detective acts as human lie detector whereby the suspect's verbal (e.g., word choice), nonverbal (e.g., posture, eye contact), and paralinguistic (e.g., response length and delivery) behaviors are analyzed to assess guilt. For example, an overly anxious,

slouching, and guarded suspect shows characteristics supposedly indicative of deception and guilt. Research that examines the validity of these factors, however, does not support this behavioral-analysis approach as a reliable means of assessing deception.<sup>17</sup> Law enforcement is no more accurate (56%) than lay people (54%) in assessing deception; police, however, are more certain of the accuracy of their assessments. For both groups, distinguishing between truth tellers and liars was not markedly better than chance accuracy.

A second pathway is what Drizen and Leo<sup>18</sup> term the *Coercion Error*, whereby using the Reid technique, law enforcement uses psychologically coercive means aimed at attacking a suspect's individual vulnerabilities as described above. The third pathway, the *Contamination Error*, misleads the suspect by presenting false evidence that does not exist and/or providing details of the offense to the suspect that only the true culprit would know.<sup>19</sup>

A new approach for interviewing suspects is the PEACE approach: **P**lanning and Preparation, **E**ngage and Explain, **O**btain an Account, **C**losure, and **E**valuation.<sup>20</sup> PEACE was designed to have interviewers ask questions to establish the truth, obtain reliable and accurate information, act fairly, and be open-minded. Acting fairly and being open-minded regarding a suspect's guilt are not trademarks of the Reid technique. In fact, the PEACE approach was designed to be a non-accusatory means of obtaining a confession. In England and Wales, 120,000 officers have been trained in the PEACE approach following some high-profile, false-confession cases. There has been a pilot project in training officers in the PEACE approach in the Canadian province of Newfoundland and Labrador.<sup>21</sup> In contrast, there does not seem to be any training currently taking place in the United States. The "jury" is out regarding the effectiveness of eliciting confessions using the PEACE approach versus the traditional Reid method. Nevertheless, there have been no reported false confessions obtained using the PEACE method.

## TYPES OF FALSE CONFESSIONS

A number of different models have been developed to explain why people falsely confess. These models have been given different names and combined and/or separated into various permutations. The following is not meant to imply these are the only reasons why someone may falsely confess. Rather, it is to provide five descriptive examples to help explain why some people may confess to crimes they did not commit.

Kassin and Wrightsman identify three types of false confessions:<sup>22</sup> (1) *voluntary false confession*, whereby a suspect confesses willingly because of a need for notoriety, need to protect a friend or relative, or a pathological need to be punished; (2) *coerced-compliant false confession*, in which the suspect confesses to escape or avoid the stressful interrogation process or to achieve some immediate goal, such as less punishment (implied by the police) or a reward for cooperation (e.g., phone call to a wife, cigarette break, etc.); and (3) *coerced-internalized false confession*, in which a suspect, after being subjected to intense pressure and suggestion by police, begins to internalize or believe falsely that he or she committed the crime. Often individuals do not trust their own memories because they may have been high on drugs or were in a psychotic state around the time period of the offense. McCann identifies another category, the *coerced-reactive false confession*, in which the suspect confesses due to threats or pressure from an outside entity, such as a fellow gang member or an abusive spouse.<sup>23</sup> A final category is the *coerced-substituted false confession*, in which a suspect has committed a finite number of similar offenses (e.g., stealing cars, burglaries) within a short, specific time period, yet confesses to a greater number of like offenses than actually committed because he or she does not remember the specifics of each and every offense.<sup>24</sup> This at times can be explained in light of the police questioning the suspect about many unsolved cases, some of which were not committed by the suspect but some of which were.

## RISK FACTORS FOR FALSE CONFESSIONS

Research has shown a number of risk factors associated with those who are susceptible to interrogative influence and, by extension, are at greater risk for giving a false confession (or a confession that, while essentially true, places the defendant in a more responsible or aggravating situation than warranted). Research summarized by Gudjonsson has shown that low intelligence, anxiety, memory impairment, sleep deprivation, and certain personality characteristics (including compliance,

17. ALBERT VRIJ, *DETECTING LIES AND DECEIT: PITFALLS AND OPPORTUNITIES* (2nd ed. 2008).

18. Drizin & Leo, *supra* note 16.

19. *Id.*

20. REBECCA MILNE & RAY BULL, *INVESTIGATIVE INTERVIEWING: PSYCHOLOGY AND PRACTICE* (1999).

21. Joseph Brean, *You're Guilty, Now Confess: False Admissions Put Police's Favourite Interrogation Tactic Under Scrutiny*, NATIONAL POST (November 25, 2011), available at <http://news.nationalpost.com/2011/11/25/youre-guilty-now-confess-false-admissions-put-polices-favourite-interrogation-tactic-under-scrutiny/>.

22. Saul M. Kassin & Lawrence S. Wrightsman, *Confession Evidence*, in *THE PSYCHOLOGY OF EVIDENCE AND TRIAL PROCEDURES* 67 (Saul M. Kassin & Lawrence S. Wrightsman eds., 1985).

23. Joseph T. McCann, *A Conceptual Framework for Identifying Various Types of False Confessions*, 16 BEHAV. SCI. & L. 441 (1998).

24. I. Bruce Frumkin, *Evaluations of Competency to Waive Miranda Rights and Coerced/False Confessions: Common Pitfalls in Expert Testimony*, in *POLICE INTERROGATIONS AND FALSE CONFESSIONS: CURRENT RESEARCH, PRACTICE, AND POLICY RECOMMENDATIONS* 191 (G. Daniel Lassiter & Christian Meissner eds., 2010).

acquiescence, poor assertiveness, and suggestibility) place an individual at risk of succumbing to police demands.<sup>25</sup>

Juveniles are particularly vulnerable to interrogation tactics. They are more apt to make decisions based on immediate gain rather than looking at long-term consequences of a behavior. Law enforcement is allowed to use deception as part of the interrogation, such as lying about evidence and misrepresenting the nature or seriousness of the charges. Although police officers are not allowed to make direct promises regarding leniency, they are allowed to imply that if the individual cooperates, he or she will get a lesser sentence. As Drizen and Leo discuss, the expectation that giving a confession will result in release is a common explanation as to why juveniles end up confessing.

The prefrontal cortex is one of the last areas of the brain to mature. It is responsible for cognition, abstract reasoning, decision making, and the modulation of appropriate behavior in social situations. It integrates information from all the senses to direct thoughts and behaviors toward a specific goal.<sup>26</sup> Juveniles are less able to reasonably evaluate consequences of their behaviors compared to adults. The prefrontal cortex needs to be fully developed to make the types of complex decisions necessary during an interrogation, such as whether to waive one's *Miranda* rights and/or give a confession—true, partially true, or false.

Kassin and Kiechel<sup>27</sup> demonstrated in the laboratory the false-confession phenomenon by convincing college undergraduates they *accidentally* caused a computer to crash by hitting the Alt key on a keyboard during a computer-based task. These false-confession studies were replicated by a number of researchers, including Redlich and Goodman.<sup>28</sup> They demonstrated that age was correlated with signing a false statement with concomitant negative consequences (i.e., spending an additional ten hours retyping the material). There are problems with extrapolating this research to real-life interrogations. First, in the criminal and juvenile contexts, punishment is more serious than ten hours of data entry. Second, research participants were convinced they accidentally, rather than purposely, committed the infraction. As Redlich and Goodman point out, the results of these studies replicate those involving the suggestibility of child witnesses in that: (a) juveniles are more suggestible than adults, (b) young children, particularly those under the age of 14, understand legal concepts less well than adults,<sup>29</sup> and (c) leading and suggestive repetitive interviews lead to inaccurate and false reports. Juveniles are substantially more vulnerable than adults to police influence and in giving false confessions.

#### THE PSYCHOLOGICAL EVALUATION AND SUBSEQUENT EXPERT TESTIMONY

The Reid interrogation method and its various offshoots are highly effective and serve the purpose of getting truly guilty individuals to confess. Unfortunately, a major problem with these techniques is that there are certain vulnerable individuals who may confess not because they committed the offense, but because they are overly susceptible to giving in to these interrogation methods. It is a proper role for a mental health professional to describe the specific psychological characteristics of a defendant, how those characteristics interact and are influenced during the interrogation, and how they may influence the validity or reliability of statements given to law enforcement compared to the average person.

In alleged false- or coerced-confession cases, a mental health professional needs to conduct a comprehensive clinical and psychosocial interview with a special focus on obtaining the defendant's version of what transpired during the interrogation. In addition, psychological tests are administered to more objectively assess those psychological vulnerabilities which have been known to be associated with a higher risk of succumbing to police demands and/or providing false statements. Such evaluations usually include intelligence, personality, and malingering tests.

One important test is the Gudjonsson Suggestibility Scale<sup>30</sup> (GSS) to specifically measure interrogative suggestibility. Interrogative suggestibility has been defined as the extent to which an individual comes to accept messages or information communicated during formal questioning as true.<sup>31</sup> Although not administered as a test of memory, the GSS is presented to the defendant as such. The test involves the reading of a complex narrative story containing 40 bits of factual information. After the story is read, the subject is asked to recall everything he or she remembers about the story. Generally, after a 50-minute delay, the defendant is again asked to recall the story's details. Then 20 standardized questions are asked about the story, 15 of which are designed to be leading or misleading. A Yield 1 score is subsequently obtained. This is the number of times the subject yields to the leading questions. Regardless of performance, the individual is firmly told he or she has made a number of errors and that it is necessary to go over each question again and to be "more accurate." Then the 20 questions are repeated. A second yield score, Yield 2, is obtained. A third measure, Shift, is obtained, which is the number of times an

**"[T]he  
Gudjonsson  
Suggestibility  
Scale...  
measure[s]  
interrogative  
suggestibility."**

25. GISLI H. GUDJONSSON, *THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS: A HANDBOOK* (2003).

26. B.J. Casey, Rebecca M. Jones, & Todd A. Hare, *The Adolescent Brain*, 1124 ANN. N.Y. ACAD. SCI. 111 (2008).

27. Saul M. Kassin & Katherine L. Kiechel, *The Social Psychology of False Confessions: Compliance, Internalization, and Confabulation*, 7 PSYCHOL. SCI. 125 (1996).

28. Allison D. Redlich & Gail S. Goodman, *Taking Responsibility for an*

*Act Not Committed: The Influence of Age and Suggestibility*, 27 L. & HUM. BEHAV. 141 (2003).

29. For a more thorough overview, see THOMAS GRISSO, *FORENSIC EVALUATIONS OF JUVENILES* (2nd ed. 2013).

30. GISLI H. GUDJONSSON, *THE GUDJONSSON SUGGESTIBILITY SCALES MANUAL* (1997).

31. *Id.* See also Frumkin, *supra* note 12.

**"Psychological testimony should [address] risk factors within the individual and the interrogation process itself...."**

individual shifts from one response (right or wrong) to a different response. A Total Suggestibility Score is also calculated, which is the sum of Yield 1 and Shift. The results of this test are directly relevant to how suggestible an individual is to police interrogations—that is, how frequently the defendant gives in to leading questions and shifts to different responses under pressure. The GSS provides one piece

of data which may be relevant to addressing issues pertaining to the validity or voluntariness of a confession. Results from the GSS become relevant only if law enforcement provides misleading information to the suspect or pressures that suspect into changing his or her response. Research has shown that Yield 1 is influenced by cognitive variables, while Yield 2 and Shift are more impacted by personality variables.<sup>32</sup>

Gudjonsson<sup>33</sup> summarizes the research regarding suggestibility and juveniles. Children who are 12 years of age and older, although no more likely to give in to leading questions than adults, are more affected by negative feedback or interrogative pressure to change their responses. Younger children are more suggestible than older children and tend to be not only more susceptible to negative feedback and pressure but also more likely to yield to leading questions, in comparison with both older juveniles and adults. This has implications as to how juveniles are interrogated.<sup>34</sup>

Gudjonsson also developed the Gudjonsson Compliance Scale (GCS) as a 20-item self-report measure to complement the GSS. Compliance differs from suggestibility because the individual does not have to privately accept the premise presented by police officers as true. On the test, the subject responds True or False to each of 20 items (e.g., I give in easily when I am pressured). There is a companion version of the test to administer to those who know the subject well. The problem with the GCS is that there is no way to assess if the respondent is presenting him or herself accurately or is purposely or unconsciously minimizing or exaggerating compliance. This is not a problem for the GSS because it is relatively immune from malingering. For example, in a study by Baxter and Bain,<sup>35</sup> an experimental group was told before administering the test that their suggestibility was to be measured. This group was told to feign suggestibility. Only the Yield 1 score on the test was affected.

Psychological testimony should serve the purpose of educating the jury about risk factors within the individual and the interrogation process itself that could increase the likelihood of a false or involuntary confession. It is not proper for the

expert to opine whether the confession was coerced, involuntary, false, likely false, or even true. Testimony related to psychological characteristics of a defendant in interaction with interrogative tactics assists in determining the weight to be given to the voluntariness or validity of a confession. This type of testimony has been accepted in many jurisdictions throughout the country. When testimony has not been allowed, it is generally because the mental health expert had planned on addressing the ultimate legal issue as to whether the defendant gave a false or involuntary confession or because relevancy for the particular case was not established.

A defendant might be highly suggestible, the police might have been overly coercive in their interrogation methods (it is for the court to draw the line as to whether the police crossed a legal threshold in their methods of extracting a *Miranda* waiver or confession), or an interactive combination of the two. Yet, a suggestible defendant may have committed an offense and nonetheless retracted a true confession. Expert testimony is designed to provide specialized knowledge to the trier of fact so a determination can be made as to how much weight to give to the confession or the effects of the interrogation on the defendant, not to provide an opinion on the validity of the confession itself. Testimony can also be provided as to the effects of particular interrogation techniques on people in general and on the defendant in particular and how those procedures can produce false confessions.

It is problematic when the mental health professional places undue and inappropriate weight on the GSS and other test scores (such as IQ) to opine that the defendant was *likely* to have given a false confession. Rather, it is preferable to discuss how such psychological factors increase the likelihood of a false confession compared to the average person. Testimony when worded in relative terms (e.g., the person's psychological functioning compared to others, which heightens the risk of a false confession) or in explanatory terms (e.g., if this person did not do the crime, why he or she may have said they did so), provides useful information to the trier of fact in deciding how much weight to give to self-incriminating statements. There is a greater chance this testimony would be admitted because it is specialized knowledge that assists the trier of fact and does not invade the province of the jury. Many clinicians blur the boundaries between their roles and that of the trier of fact. When this happens, such testimony is oftentimes not allowed at trial.

Some argue that the GSS should only be used in cases in which a suspect erroneously believed he or she committed the crime: a coerced-internalized false-confession scenario. Further, some suggest GSS is not relevant for the type of confession in which a suspect confesses due to pressure from police or from others because these suspects know whether or not they committed the crime, and their "autobiographical memory" was not impaired.<sup>36</sup> This is a fallacy because the Shift

32. GISLI H. GUDJONSSON, *THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS* (2003); I. Bruce Frumkin, Stephen J. Lally, & James E. Sexton, *A United States Forensic Sample for the Gudjonsson Suggestibility Scales*, 30 BEHAV. SCI. & L. 749 (2012).

33. *Id.*

34. See also Frumkin et al., *supra* note 32 (replicating the findings

reported by Gudjonsson in a United States sample).

35. James S. Baxter & Stella A. Bain, *Faking Interrogative Suggestibility: The Truth Machine*, 7 LEGAL & CRIM. PSYCHOL. 219 (2002).

36. See, e.g., Nigel Beail, *Interrogative Suggestibility, Memory, and Intellectual Disability*, 15 J. APPL. RES. INTELL. DISABILITY 129 (2002).

score is much less influenced by memory processes than the Yield score. There is also a correlation between compliance and suggestibility. Finally, as with all test data, the results must be interpreted by the totality of the circumstances for a particular defendant in the context of a specific case and its facts.

## RECENT RULINGS ON ADMISSIBILITY OF FALSE-CONFESSION, EXPERT TESTIMONY

Case law has been mixed regarding the admissibility of expert testimony on false confessions in general or the use of the GSS in particular.<sup>37</sup> Several courts support the position that such expert evidence both in juvenile and adult cases adds critical evidence to the jury's determination of whether a confession might be false. In a seminal case, nearly two decades ago, the Seventh Circuit in *United States v. Hall*<sup>38</sup> found that although a trial court may exclude "expert testimony that may in some way overlap with matters within the jury's experience,"<sup>39</sup> the court's determination that the sociological expert's "testimony would add nothing to what the jury would know from common experience"<sup>40</sup> was an insufficient basis to prevent the jury from considering valid social science evidence.<sup>41</sup> Two other federal circuits have issued decisions similar to *Hall*,<sup>42</sup> as have the Federal District Court of New Mexico<sup>43</sup> and nine states: California,<sup>44</sup> Colorado,<sup>45</sup> Florida,<sup>46</sup> Indiana,<sup>47</sup> Kentucky,<sup>48</sup> Nebraska,<sup>49</sup> New York,<sup>50</sup> North Carolina,<sup>51</sup> and Utah.<sup>52</sup>

However, courts have not unequivocally allowed expert testimony, with the majority of exclusions based on the helpful-

ness of the expert testimony to the trier of fact. In *People v. Bennet*,<sup>53</sup> for example, a trial court refused to allow expert testimony (by this author) concerning a defendant's suggestibility because the trial court decided (and the Illinois Appellate Court upheld) that interrogative suggestibility "was not beyond the common knowledge of lay persons and would not aid the trier of fact in reaching its conclusions."<sup>54</sup> Furthermore, the defendant's suggestibility was not tied to a diagnosed mental illness.<sup>55</sup> Similarly, 12 other states—Alaska,<sup>56</sup> Arkansas,<sup>57</sup> Georgia,<sup>58</sup> Iowa,<sup>59</sup> Kansas,<sup>60</sup> Louisiana,<sup>61</sup> Maine,<sup>62</sup> Massachusetts,<sup>63</sup> Michigan,<sup>64</sup> Minnesota,<sup>65</sup> Missouri,<sup>66</sup> and New Jersey<sup>67</sup>—three of the federal circuits,<sup>68</sup> the Federal District Court in Massachusetts,<sup>69</sup> and the U.S. Court of Appeals for the Armed Forces<sup>70</sup> have rejected expert testimony as unreliable or usurping the function of the jury. Nevertheless, as suggested elsewhere in this issue, the vast majority of commentators who have examined the issue believe trial courts "should be open to hearing from an expert on police interrogations of juveniles as they consider the police tactics used and the ultimate voluntariness of the confession, and the same is true for adults."<sup>71</sup>

As might be anticipated in light of the overall mixed receptivity by courts to expert evidence in general regarding confes-

**"[E]xpert evidence... adds critical evidence [about] whether a confession might be false."**

37. One jurisdiction, Texas, has conflicting appellate court determinations, one allowing expert testimony, *Scott v. State*, 165 S.W.3d 27 (Tex. App. 2005), *overturned on other grounds*, 227 S.W.3d 670 (Tex. Crim. App. 2007), and one excluding such testimony, *Green v. State*, 55 S.W.3d 633 (Tex. App. 2001), *cert. denied*, 535 U.S. 958 (2002). The *Scott* decision did not reference *Green*.

38. *United States v. Hall*, 93 F.3d 1337 (7th Cir. 1996).

39. *Id.* at 1344.

40. *Id.* at 1341.

41. *Id.* at 1344–45.

42. *United States v. Shay*, 57 F.3d 126 (1st Cir. 1995); *United States v. Belyea*, 159 Fed. Appx. 525 (4th Cir. 2005).

43. *United States v. Ganadonegro*, 805 F.Supp.2d 1188 (D.N.M. 2011).

44. *People v. Page*, 2 Cal.Rptr.2d 898 (Cal. Ct. App. 1991).

45. *People v. Flippo*, 159 P.3d 100 (Colo. 2007).

46. *Boyer v. State*, 825 So.2d 418 (Fla. Dist. Ct. App. 2002).

47. *Callis v. State*, 684 N.E.2d 233 (Ind. App. 1997).

48. *Terry v. Commonwealth*, 332 S.W.3d 56 (Ky. 2010).

49. *State v. Buechler*, 253 Neb. 727, 572 N.W.2d 65 (1998).

50. *People v. Bedessie*, 19 N.Y.3d 147 (Ct. App. 2012).

51. *State v. Baldwin*, 125 N.C. App. 530, 482 S.E.2d 1 (1997).

52. *State v. Prows*, 246 P.3d 1200 (Utah Ct. App. 2011). *See also State v. Perea*, 2013 UT 68, — P.3d —, 2013 WL 6038827, 747 Utah Adv. Rep. 10, 17 (S. Ct., Nov. 15, 2013) (holding science of false confessions has evolved sufficiently "to allow its routine introduction").

53. *People v. Bennet*, 376 Ill.App.3d 554, 876 N.E.2d 256 (1 Dist. 2007), *rehearing denied*, Oct. 23, 2007, *app. denied*, 256 Ill.2d 618 (S. Ct. 2008), *aff'd*, 2013 WL 5761400 (Ill. App. 1 Dist., Oct. 22, 2013). *See also People v. Polk*, 407 Ill.App.3d 80 (Ill. App. Ct. 2010) (similar holding regarding exclusion of expert).

54. 376 Ill.App. at 571, 876 N.E.2d at 272.

55. 376 Ill.App. at 573, 876 N.E.2d at 273 (contrasting this case from another suggestibility case where "expert testimony...was relevant because 'juries are unlikely to know that social scientists and psychologists have identified a personality disorder that will cause individuals to make false confessions,'" *quoting United States v. Hall*, 93 F.3d 1337, 1345 (7th Cir. 1996)).

56. *Vent v. State*, 67 P.3d 661 (Alaska Ct. App. 2003).

57. *Vance v. State*, 2011 Ark. 243 (Ark. 2011).

58. *Lyons v. State*, 282 Ga. 588 (Ga. 2007).

59. *State v. Fay*, 803 N.W.2d 128 (Iowa Ct. App. 2011).

60. *State v. Cobb*, 30 Kan.App.2d 544, 43 P.3d 855 (2002).

61. *State v. Boyer*, 56 So.3d 1119 (La. App. 3d Cir. 2011), *rehearing denied*, 56 So.3d 1162 (La. App. 3d Cir. 2011), *writ denied*, 78 So.3d 138 (La. S. Ct. 2012), *cert. dismissed*, 133 S.Ct. 1702 (2013).

62. *State v. Tellier*, 526 A.2d 941 (Me. 1987).

63. *Commonwealth v. Tolan*, 904 N.E.2d 397 (Mass. 2009).

64. *People v. Kowalski*, 795 N.W.2d 19 (Mich. 2011).

65. *Bixler v. State*, 582 N.W.2d 252 (Minn. 1998).

66. *State v. Wright*, 247 S.W.3d 161 (Mo. App. 2008).

67. *State v. Free*, 351 N.J.Super. 203, 798 A.2d 83 (2002).

68. *United States v. Dixon*, 261 Fed. Appx. 800 (5th Cir. 2008); *United States v. Antone*, 412 Fed. Appx. 10 (9th Cir. 2011); *United States v. Benally*, 541 F.3d 990, 995 (10th Cir. 2008). *See also Belyea*, 159 Fed. Appx. at 529–30 (trial court should have made a specific determination regarding whether the proffered expert evidence was within common knowledge of jurors).

69. *United States v. Jacques*, 784 F.Supp.2d 59 (D.Mass. 2011).

70. *United States v. Griffin*, 50 M.J. 278 (U.S.A.F. 1999).

71. Joshua A. Tepfer, Laura H. Nirider, & Steven A. Drizin, *Scrutinizing Confessions in a New Era of Juvenile Jurisprudence*, 50 CT. REV. 4, 9 (2014).

**“[A] reoccurring issue courts have focused on is the fit of the expert testimony to the case facts.”**

sions, courts’ allowances/exclusions of testimony based on the GSS have been similarly mixed. In *Misskelley v. State*,<sup>72</sup> for example, the Supreme Court of Arkansas upheld the trial court’s ruling to disallow a clinical psychologist to testify *based on the GSS*.<sup>73</sup> The psychologist was allowed to testify that the juvenile defendant was “quite suggestible,” however.<sup>74</sup> Thus, the trial court did allow the psychologist and another expert, a sociologist, to offer their expert opinions about the voluntariness of the defendant’s confession.<sup>75</sup> Similarly, in *Commonwealth v. Soares*,<sup>76</sup> the Appeals Court of Massachusetts upheld a motion judge’s decision not to accord any weight to a psychologist’s testimony regarding the defendant’s confession as part of the defendant’s motion to suppress his statements to police.<sup>77</sup> The psychologist appeared unaware of the purpose of the GSS, stating that the GSS results would not apply to a custodial situation if “the interrogation was devoid of physical force” or shouting.<sup>78</sup>

The GSS was judged to meet *Daubert*<sup>79</sup> and *Frye*<sup>80</sup> standards of admissibility in *United States v. Raposo*<sup>81</sup> and *People v. Nelson*.<sup>82</sup> In *Raposo*, the Federal District Court rejected the government’s request to exclude expert testimony on false confessions and the GSS<sup>83</sup> because it was deemed relevant to the factual question of both the falsity and the voluntariness of the confession.<sup>84</sup> In *Nelson*, the Illinois Supreme Court noted the trial court found the GSS was generally accepted in the scientific community, thus meeting the *Frye* test for admissibility.<sup>85</sup>

Finally, a reoccurring issue courts have focused on is the fit of the expert testimony to the case facts. In *United States v. Deuman*,<sup>86</sup> a false-confession expert’s testimony was ruled inad-

missible. The problem was not that the expert’s theories were problematic as a general matter; rather, they were deemed “unreliable and irrelevant” to the specific facts at issue in the case.<sup>87</sup> Coupled with the risk that the expert’s testimony of the possibility of a coerced confession would be especially persuasive to the jury,<sup>88</sup> the proffered testimony was excluded. In its analysis, the court distinguished the proffered testimony in this case from cases where the expert testimony is intended to assist the fact finder in understanding how the defendant’s psychology makes him or her especially susceptible to making a false confession.<sup>89</sup> Similar to *Deuman*, an Oregon trial court disallowed GSS testimony not because the judge felt that the GSS was a poor test but because the court believed “it’s a comment on the evidence, it’s a comment on the voluntariness.”<sup>90</sup> However, the Oregon Court of Appeals disagreed with the trial court and allowed the testimony, stating, “It would have been probative, relevant, and helpful to the trier of fact.”<sup>91</sup>

## RECOMMENDATIONS

Law enforcement officers in the United States use the Reid technique or similar interrogation practices to get people whom they believe are guilty of a crime to confess. It is an effective method to get guilty people to confess to crimes, in that half of criminal cases involve a confession.<sup>92</sup> Whether it is fair to use deceit and psychologically coercive procedures to extract confessions is both a societal and moral issue. Public safety concerns as well as punishment for those who do not uphold the law generally trump, in many peoples’ minds, concerns for how confessions are obtained, as long as the interrogation does not involve physical coercion or extreme deprivation.

The problem is that there are certain vulnerable people who may confess to a crime they did not commit because of these very interrogation tactics designed to get guilty people to con-

72. *Misskelley v. State*, 323 Ark. 449, 915 S.W.2d 702 (1996), cert. denied, 519 U.S. 898 (1996).

73. 323 Ark. at 475; 915 S.W.2d at 716. It is noteworthy that the expert in this case had never administered the GSS before this case.

74. *Id.*

75. 323 Ark. at 474–75; 915 S.W.2d at 715–16. Interestingly, as noted previously, *supra* note 57, in its 2011 decision in *Vance v. State*, the Arkansas Supreme Court held the trial court did not err in *excluding* expert testimony about the defendant’s confession because the court found the proffered evidence would invade or otherwise not assist the jury in its decision making. 383 S.W.3d at 342–44. The *Vance* opinion did not reference *Misskelley*. Taken together, the two cases appear to support the proposition that the trial court has a lot of discretion in determining whether and what expert evidence will be helpful to the jury.

76. *Commonwealth v. Soares*, 51 Mass.App.Ct. 273, 745 N.E.2d 362 (2001).

77. 51 Mass.App.Ct. at 281–82, 745 N.E.2d at 368–71.

78. *Crane v. Kentucky*, 476 U.S. 683 (1986).

79. *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

80. *Frye v. United States*, 293 F.1013 (D.C.Cir. 1923).

81. *United States v. Raposo*, 1998 WL 879723 (S.D.N.Y. Dec. 16, 1998).

82. *People v. Nelson*, 922 N.E.2d 1056 (Ill. 2009).

83. *Id.* at 3.

84. *Id.* at 4–5.

85. *Id.* at 1081. The judge had in fact excluded the expert’s (this author’s) testimony regarding the defendant’s confession susceptibility based on the GSS. *Id.* at 1076. However, the judge’s analysis regarding whether the GSS met the *Frye* admissibility standard was flawed. *Id.* at 1080–81. Nevertheless, the judge’s ruling in not allowing the expert testimony was harmless because of other pertinent facts beyond the defendant’s confession and potential suggestibility. *Id.* at 1082.

86. *United States v. Deuman*, 892 F.Supp.2d 881 (W.D. Mich. 2012).

87. *Id.* at 886.

88. *Id.* at 888, 890–91.

89. Courts typically allow “false confession expert testimony to explain how a defendant’s mental illness or retardation or personality trait rendered the defendant more susceptible to coercion or persuasion.” *Id.* at 887, citing, among other supporting case law, the federal circuit court opinions from the First (*Shay*) and Seventh (*Hall*) Circuits.

90. *State v. Romero*, 191 Or.App. 164, 168, 81 P.3d 714, 717 (2003), rev. denied, 337 Or. 248 (2004).

91. 191 Or.App. at 178, 81 P.3d at 722.

92. WRIGHTSMAN & KASSIN, *supra* note 8.



fess. Such vulnerabilities include low intelligence, anxiety, memory problems, acquiescence, suggestibility, compliance, and sleep deprivation. Juveniles and young adults are particularly susceptible to false confessions. Although the PEACE model for investigative interviews seems to rarely produce false confessions, it is not yet known whether the guilty confess when the PEACE model is used at the same rate as when the Reid technique is used.

Mental health testimony about an individual's vulnerability to interrogation tactics that might produce a false or partially false confession can provide the trier of fact with important information to assist in deciding how much weight should be given to the confession. The testimony must consist of specialized knowledge and be relevant to how the confession was ultimately obtained.



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